

BRB No. 05-0490

EARL LAWRENCE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STEVENS SHIPPING COMPANY)	DATE ISSUED: 02/28/2006
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah,
Georgia, for claimant.

Stephen E. Darling (Haynsworth Sinkler Boyd, P.A.), Charleston, South
Carolina, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1993-LHC-0213) of
Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.
§901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the
administrative law judge which are rational, supported by substantial evidence, and in
accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

This case is on appeal to the Board for the sixth time. Claimant injured his neck,
back, shoulders, and knees at work on January 16, 1991. Employer voluntarily paid claimant
temporary total disability benefits from January 29, 1991, through April 4, 1991, and
temporary partial disability benefits from April 4, 1991, through April 16, 1991. Claimant

returned to work in May 1991, and stopped working in March 1992 due to alleged pain from the work injury. In a 1994 decision, Administrative Law Judge Holmes initially awarded claimant temporary total disability benefits from January 16, 1991, through September 18, 1992 and a scheduled award for a 10 percent impairment to his left lower extremity for the knee injury. 33 U.S.C. §908(c)(2). He denied claimant's back injury claim. In May 1996, claimant requested modification, seeking benefits for a 17 percent impairment to his left lower extremity, and an award for a loss in wage-earning capacity due to his back injury. *See* 33 U.S.C. §922. The administrative law judge denied claimant's motion for modification. Claimant appealed to the Board.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 96-1574 (July 17, 1997)(unpub.), the Board vacated the administrative law judge's decision on modification and remanded for him to reconsider evidence relating to claimant's entitlement to awards for a 17 percent impairment to the left lower extremity and for his back injury. On remand, the administrative law judge again denied the claims for increased benefits. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 98-0678 (Feb. 2, 1999)(unpub.), the Board modified the administrative law judge's decision to award benefits for a 17 percent impairment to the left lower extremity and held that claimant's back injury is work-related as a matter of law. The Board remanded the case to the administrative law judge to consider the remaining issues relating to claimant's work-related back injury. On remand, the administrative law judge held employer liable for medical expenses due to claimant's work-related back injury. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 99-0844 (May 10, 2000)(unpub.), the Board remanded the case for the administrative law judge to address whether claimant established a *prima facie* case of total disability with regard to his work-related back injury. On remand, the administrative law judge found that claimant did not establish a *prima facie* case of total disability, and alternatively, that claimant does not have a permanent work-related back condition. Thus, the administrative law judge again denied disability benefits for claimant's back condition. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 01-0172 (Oct. 22, 2001)(unpub.), the Board vacated the administrative law judge's denial of benefits with regard to claimant's back injury and again remanded the case to the administrative law judge to determine whether claimant established his inability to return to his usual work due to his back injury. The Board instructed the administrative law judge on remand to weigh Dr. DuBois's 1996 opinion that claimant is unable to work as a longshoreman against the opinions of Drs. Thompson and Nicholson, who opined that claimant could return to his usual work in 1991 and 1993, respectively. The Board held that Dr. DuBois's opinion, if credited, establishes a change in claimant's condition since the entry of the initial award and/or a mistake in fact in

the administrative law judge's initial decision. The Board affirmed as rational the administrative law judge's discrediting of claimant's testimony that he cannot perform any longshore work. On remand, the administrative law judge again denied disability benefits for claimant's back injury, rejecting Dr. DuBois's 1996 opinion that claimant is unable to return to work as a longshoreman due to his back injury. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 02-0762 (July 25, 2003)(unpub.), the Board vacated the administrative law judge's rejection of Dr. DuBois's 1996 opinion in favor of the 1991 and 1993 opinions of Drs. Thompson and Nicholson, and remanded for a reweighing of this evidence, as the administrative law judge provided no valid basis for rejecting Dr. DuBois's opinion. On remand, the case was reassigned to Judge Malamphy, as Judge Holmes was no longer with the Department of Labor. The administrative law judge denied claimant disability benefits for his work-related back injury, finding that Dr. DuBois's 1996 opinion did not establish a change in condition, and that upon the weighing of the opinions of Drs. DuBois, Nicholson, and Thompson, there was no mistake in fact in Judge Holmes's initial decision. Claimant appeals.

In the instant appeal, claimant challenges the administrative law judge's denial of disability benefits for his back injury, asserting that the administrative law judge erred in finding that Dr. DuBois's opinion does not establish a change in condition, and that he improperly weighed the medical opinions of record in concluding that there was no mistake in fact in the initial decision. Employer responds in support of the administrative law judge's decision.

In a modification claim, as here, the moving party bears the burden of establishing a change in claimant's physical or economic condition since the entry of the initial decision, or a mistake in a determination of fact in the initial decision. See *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). As the Board stated in its 2001 decision, Dr. DuBois's 1996 opinion, dated after the initial award of benefits, establishes a basis for modification unless the administrative law judge provides valid reasons for not crediting this opinion. *Lawrence*, BRB No. 01-0172, slip op. at 5.

In the last decision, the administrative law judge discounted Dr. DuBois's 1996 opinion that claimant was totally disabled because it was based on claimant's subjective complaints of pain which lacked credibility, and because it was outweighed by the 1991 and 1993 opinions of Drs. Thompson and Nicholson, respectively, that claimant was not totally disabled. Decision and Order Denying Benefits at 12; Ex. 4 to Employee's Brief in Support of His Request for Modification; Emp. Ex. A 7; Cl. Ex. 13. The administrative law judge found that the opinions of Drs. Thompson and Nicholson that claimant was exaggerating his symptoms were supported by the contemporaneous opinions of Drs. Tatum and DuBois. In

addition, in his 1996 opinion, Dr. DuBois stated that claimant is not malingering but at times exaggerates his pain. Decision and Order Denying Benefits at 12; Ex. 4 to Employee's Brief in Support of His Request for Modification; Emp. Exs. A 5, 7; Cl. Exs. 8, 10, 13. We affirm the administrative law judge's discounting of Dr. DuBois's 1996 opinion as such a finding is within his discretion.¹ See *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, we affirm the administrative law judge's denial of claimant's request for modification seeking an award for a loss in wage-earning capacity due to his work-related back injury.

¹ We reject, however, the administrative law judge's finding that Dr. DuBois's 1996 opinion that claimant is totally disabled does not establish, on its face, a change in condition since the entry of the initial award of benefits. See Decision and Order Denying Benefits at 9-10. Judge Holmes awarded claimant temporary total disability benefits in 1994 only from January 16, 1991 to September 18, 1992. Although Dr. DuBois opined in January 1993 that claimant was permanently totally disabled, this opinion was not credited by Judge Holmes. Dr. DuBois again stated in 1996 that claimant is permanently disabled and cannot work, and this opinion represents a change in claimant's condition from the benefits awarded by Judge Holmes. Moreover, the Board held in its 2001 decision that Dr. DuBois's opinion was sufficient, if credited, to establish a change in condition. *Lawrence*, BRB No. 01-0172, slip op. at 5. This decision constitutes the law of the case. See, e.g., *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Because we affirm the administrative law judge's rational rejection of Dr. DuBois's 1996 opinion, we hold that any error in the administrative law judge's analysis in this regard is harmless.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge